

STATE OF CALIFORNIA

OFF-HIGHWAY MOTOR VEHICLE RECREATION COMMISSION

PUBLIC HEARING

FRIDAY, NOVEMBER 18, 2005

9:16 a.m. to 9:55 a.m.

HELD AT

LAKE NATOMA INN

PAVILION ROOM

FOLSOM, CALIFORNIA

Reported by CHERYL L. KYLE, CSR No. 7014

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1 (Folsom, California November 18, 2005.)
2 CHAIR SPITLER: Meeting will come to order.
3 Start with the Pledge of Allegiance.
4 (Pledged the flag.)
5 CHAIR SPITLER: Call roll.
6 MS. ELDER: Judith Anderson.
7 COMMISSIONER ANDERSON: Present.
8 MS. ELDER: John Brissenden.
9 COMMISSIONER BRISSENDEN: Here.
10 MS. ELDER: Robert Chavez. Paul Spitler.
11 CHAIR SPITLER: Here.
12 MS. ELDER: Harold Thomas.
13 COMMISSIONER THOMAS: Here.
14 MS. ELDER: Michael Prizmich.
15 COMMISSIONER PRIZMICH: Here.
16 MS. ELDER: Edward Waldheim.
17 CHAIR SPITLER: Okay. Thank you.
18 (Mr. Waldheim arrived in room.)
19 CHAIR SPITLER: I hate to subject the audience
20 to the discussion that's about to ensue here, but we've
21 been informed in the past 48 hours about legal issues
22 regarding compliance of this meeting. And
23 unfortunately we're going to have begin by that
24 discussion as to whether or not we're legally able to
25 meet today.

1 So I would like to hand the mike over to Billy
2 Jenkins, the counsel for the Commission, for him to
3 read a letter that he prepared and distributed to the
4 Commissioners.

5 COUNSEL JENKINS: The letter is dated
6 November 17th, 2005. It's to Chairman Paul Spitler,
7 and it reads:

8 "Dear Chairman Spitler: This
9 will confirm advice that I provided
10 to you and the Division staff
11 yesterday with regard to the issue
12 that was brought in this office's
13 attention on Wednesday,
14 November 16th, 2005.

15 "This office was informed for
16 the first time that the notice of
17 meeting and agenda for the meeting
18 scheduled for November 18th and 19th,
19 2005 was posted on the website on
20 Tuesday, November 8th, 2005. We are
21 informed that the written version of
22 the notice and agenda was mailed to
23 the general public after that date,
24 and that the most recent
25 representation from the Division

1 staff is that the notice and agenda
2 were mailed to the public on the
3 Division's mailing list on
4 November 9th, 2005.

5 "As you no doubt are aware, the
6 Commission's meetings and
7 deliberations are governed by the
8 Bagley-Keene Open Meeting Act.
9 There's a citation to Government Code
10 Section 11120, et seq. Government
11 Code Section 11125 provides that
12 Subsection A, 'The state body shall
13 provide notice of its meetings to any
14 person who requests that notice in
15 writing. Notice shall be given and
16 also made available on the Internet
17 at least ten days in advance of the
18 meeting.' Subdivision B, 'The notice
19 of a meeting of a body that is a
20 state body shall include a specific
21 agenda for the meeting.'

22 "Under our interpretation and
23 application of Government Code
24 Section 11125, the notice and agenda
25 for the meeting on November 18th,

1 2005 needed to be posted on the
2 Internet and mailed no later than
3 November 8th, 2005. It is our
4 information that the mailing did not
5 occur on November 8th, 2005;
6 therefore, the meeting scheduled for
7 November 18th, 2005 does not comply
8 with the notice provisions of the
9 Bagley-Keene Open Meeting Act and
10 would violate the act. And there's a
11 citation to Government Code Section
12 11125(a) and (b).

13 "The Bagley-Keene Act provides a
14 legal remedy to void any action by a
15 commission that violates the act,
16 Government Code Section 11130.3.
17 There is a provision that states an
18 action is not void if the action was
19 taken in substantial compliance with
20 Government Code Section 11125,
21 citation to Government Code Section
22 11130.3(b)(3).

23 "We do not interpret this
24 provision to mean that the Division
25 and consequently the Commission can

1 avoid such a remedy if they fail to
2 strictly comply with the ten-day
3 notice requirement, or that they had,
4 in fact, complied with the ten-day
5 notice provision under the facts as
6 they have been represented to us.

7 "In addition to civil remedies,
8 the act provides for criminal
9 penalties. Any member who attends a
10 meeting in violation of the
11 Bagley-Keene Open Meeting Act may be
12 subject to prosecution and found
13 guilty of a misdemeanor. That is
14 Government Code Section 11130.7.

15 "Sincerely, William Jenkins,
16 Deputy Attorney General, for Bill
17 Lockyer, Attorney General."

18 And it was cc'd to the Commissioners Judith
19 Anderson, John Brissenden, Robert Chavez, Ed Waldheim,
20 Mike Prizmich, Harold Thomas, and Deputy Director
21 Daphne Greene.

22 CHAIR SPITLER: Thank you. Counsel, maybe you
23 can just kind of -- having prepared that letter, some
24 Commissioners may be hearing this for close to the
25 first time. Certainly members of the public are

1 hearing this for the first time. Maybe you could just
2 summarize what you see as the issues here and the no
3 recommendation for how the Commission should proceed at
4 this point.

5 COUNSEL JENKINS: I suppose the two issues were
6 identified in the letter, and that would be the concern
7 that -- well, first off, that the meeting doesn't
8 comply with the Bagley-Keene notice, ten-day notice
9 provision for issuance of the notice and agenda on the
10 Internet and through the mail.

11 The second issue is the potential for litigation
12 that challenges any action taken by the Commission and
13 a remedy that is an order basically finding that the
14 action is null and void.

15 And then the third, though it's not -- I want to
16 make sure I'm clear here. I represent the Commission
17 as a whole, and the criminal penalties are directed to
18 the Commissioners, individually. And I don't represent
19 the Commissioners individually; but nonetheless as a
20 courtesy, I identify for them to you that potential.

21 COMMISSIONER THOMAS: We appreciate that
22 courtesy.

23 COMMISSIONER PRIZMICH: Can I ask a question if
24 it would be appropriate?

25 CHAIR SPITLER: Commissioner Prizmich.

1 COMMISSIONER PRIZMICH: Under what
2 circumstances -- given what we're faced with here,
3 under what circumstances would the Commissioners be in
4 violation of a misdemeanor? How would you see that
5 played out?

6 COUNSEL JENKINS: I'm not in the business of
7 predicting how a potential criminal prosecution might
8 go.

9 COMMISSIONER PRIZMICH: You're in the business
10 of identifying it to us, and we are trying to make a
11 decision whether to move forward with this meeting.
12 And as part of that decision-making process, I'd like
13 to know just how real this threat is.

14 COUNSEL JENKINS: What I'm willing to do is I
15 can read the section to you, so you can have some sense
16 of the standards that would apply so you would know
17 what would have to be proven. As I said --

18 COMMISSIONER PRIZMICH: Why don't you do that?
19 I would appreciate that.

20 COUNSEL JENKINS: I'm reading from Government
21 Code Section 11130.7, and the title is, "Violations,
22 misdemeanor."

23 "Each member of a state body who
24 attends a meeting of that body in
25 violation of any provision of this

1 article, and where the member intends
2 to deprive the public of information
3 to which the member knows or has
4 reason to know the public is entitled
5 under this article, is guilty of a
6 misdemeanor."

7 COMMISSIONER PRIZMICH: So it's a specific
8 intent crime in that you're asking -- we have to have
9 knowledge that we are specifically but intending to
10 withhold from the public information, is that it?

11 COUNSEL JENKINS: It's a specific intent,
12 correct.

13 COMMISSIONER BRISSENDEN: So we can take the
14 monocles off at the moment.

15 At the very least, Chairman Spitler, any
16 decision that's made today would be voided by this
17 particular advice, correct?

18 COUNSEL JENKINS: I think it would be voided if
19 there was a lawsuit that challenged it under the code
20 section that was identified, and that remedy is a
21 possibility.

22 COMMISSIONER WALDHEIM: Mr. Chairman.

23 CHAIR SPITLER: Commissioner Waldheim.

24 COMMISSIONER WALDHEIM: Would it be appropriate
25 to find out how is it even possible that we have two

1 counsel people not agreeing from Attorney General
2 Office's, Bill Lockyer. Bradley Torgan tells us we're
3 okay, and Bill tells us we're not okay, yet they both
4 work for the Attorney General's Office.

5 Can somebody explain to me how can we possibly
6 have two people working for the same boss coming with
7 different ideas when it's doesn't make any sense to me?

8 COUNSEL JENKINS: I can pretty much guarantee
9 that that would never happen. But I work for Bill
10 Lockyer, and he does not work for Bill Lockyer.

11 COUNSEL TORGAN: I'm Brad Torgan. I'm general
12 counsel for the Department of Parks and Recreation. I
13 do not, as Billy has, worked for the Department of
14 Justice. We both work for the State, but we have
15 different bosses within the state.

16 COUNSEL JENKINS: And separate constitutional
17 law officers if you really want to think about it.

18 COMMISSIONER WALDHEIM: So am I to take it,
19 Mr. Torgan, that you will defend us if something
20 happens?

21 COUNSEL TORGAN: Yeah, I will take the hit in
22 telling you that I believe you are and the Division is
23 in full compliance with Bagley-Keene under those
24 provisions. And you are well taken to move forward
25 with the meeting because notice has been provided.

10

1 COMMISSIONER THOMAS: But you didn't answer the
2 question, sir.

3 Will you defend us in the event that that
4 decision goes adversely?

5 COUNSEL TORGAN: I believe that's the
6 responsibility of the Attorney General's Office.

7 COMMISSIONER THOMAS: So the answer is, no, you
8 would not defend us in that matter.

9 CHAIR SPITLER: Do you represent the Commission?

10 COUNSEL TORGAN: I represent the Division and
11 the department.

12 COMMISSIONER WALDHEIM: Mr. Chairman, I would
13 beg to differ. If I wanted to make a case, we are
14 employees of the State of California. We are being
15 paid through the Department of Parks and Recreation.
16 So I can make a case that I am an employee of the
17 Division because they're the ones who give me the
18 checks, so, therefore, I'm going to look to Mr. Torgan
19 to defend me.

20 CHAIR SPITLER: Okay, you can do that. You're
21 free to do that, but the Commission as a whole is
22 represented by the Attorney's General Office, who is
23 represented by Mr. Jenkins.

24 COMMISSIONER WALDHEIM: May I ask a question,
25 Mr. Chairman? When in the world did we come up with

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1 two different counsels? We never used to do that. How
2 all of a sudden -- how did that ever happen and why?
3 We always had the Attorney General's Office present at
4 our meetings. We never had a legal counsel for DPR
5 here, never.

6 DEPUTY DIRECTOR GREENE: I believe it has always
7 been actually DPR counsel, Chairman Spitler. And then
8 I believe in the year 2000 or 2001, it was requested
9 that that Commission have separate counsel. And as a
10 result, since that time we've seen two separate
11 counsels.

12 COMMISSIONER WALDHEIM: Okay. Mr. Chairman, may
13 I make a suggestion to get out of this mess?

14 May we consider this meeting -- and,
15 Mr. Jenkins, you tells if that would be a possibility.
16 Can we pretend or make this to be a subcommittee
17 meeting? Today we're going to make a subcommittee
18 meeting. We're going to start working on -- make no
19 decisions, but we're going to start making subcommittee
20 meeting, and tomorrow we will wrap it up with a bowtie
21 under legal meeting. We don't make any votes. We know
22 where everybody's coming. We do the massaging back and
23 forth. We are not voting on anything. And tomorrow we
24 wrap it all up in a nice bowtie, and we're legal?

25 COMMISSIONER PRIZMICH: If I can just -- first

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1 of all, I'd like to make a declaration. I think
2 there's a conflict of interest between both of our
3 attorneys and what we're doing here. So I'm not sure
4 where we need to go with that, but we're trying to make
5 a decision based upon opposing attorneys' advices, and
6 yet we individually are hanging out there if we move
7 forward. That's really conflicting us, I think.

8 But that being said, what was your question?

9 COMMISSIONER WALDHEIM: If we call this a
10 subcommittee meeting.

11 COMMISSIONER PRIZMICH: My position on that, and
12 this is purely my position, is that if the meeting is
13 indeed inappropriately noticed today, this meeting is
14 comprised of today and tomorrow, it would be
15 inappropriately noticed tomorrow, as well.

16 COMMISSIONER WALDHEIM: That's not what it said.

17 COMMISSIONER PRIZMICH: If we're going to take
18 input today and then make a decision tomorrow, it's the
19 same notice in my view.

20 COMMISSIONER THOMAS: I think that's right.

21 COMMISSIONER WALDHEIM: Is that correct, Bill
22 Jenkins?

23 COMMISSIONER THOMAS: A notice for a two-day
24 meeting is a two-day meeting. You can't divide it in
25 half.

1 COMMISSIONER PRIZMICH: I'd love to do that, Ed.

2 I'd like to do that. I just -- I just have a
3 philosophical problem if it's illegal today, it's
4 illegal tomorrow; it's all the same meeting.

5 CHAIR SPITLER: I also, Commissioner Waldheim,
6 know for a fact that at least some of the notices for
7 this meeting did not go in the mail until the 10th,
8 which makes tomorrow's meeting out of compliance, as
9 well.

10 COMMISSIONER WALDHEIM: Mr. Chairman, I would
11 suggest the following then: That we hold a
12 subcommittee meeting of the grants cooperative
13 agreements to follow up with what we did the last two
14 meetings at that time. A lot of massaging has been
15 done. The public gets an opportunity to testify, get
16 their points across. And then on the December 9th
17 meeting, which we already have -- we better have it
18 publicly announced, we wrap it up with a bowtie at that
19 time, but at least we go through the motion.

20 We have all of these people over here. There's
21 no way I'm going home without addressing the issues
22 that these folks have. It's totally unfair, totally
23 unfair. And that would solve it. We just call it a
24 subcommittee meeting, then we vote on -- we're not
25 voting on anything, so then we're not breaking any law.

14

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1 COMMISSIONER THOMAS: Why is that different than
2 what you just said a moment ago?

3 COMMISSIONER WALDHEIM: Commissioner Prizmich
4 stated that if it was noticed one day, it affects the
5 second day. So I'm giving up on that because I'm not
6 getting any help there.

7 COMMISSIONER THOMAS: So is what you're saying
8 that you'll call it a subcommittee, and then it won't
9 be a meeting?

10 COMMISSIONER WALDHEIM: I'm calling it a
11 subcommittee because we're not making a vote. The key
12 here is voting. We're taking public testimony, and
13 we're massaging and working, but we're not voting.
14 That's an area where we would break the law if we
15 actually voted on something.

16 COMMISSIONER THOMAS: Isn't the key that we're
17 actually considering meeting, not just an action, but
18 the meeting itself?

19 COMMISSIONER WALDHEIM: Good point.

20 COMMISSIONER THOMAS: I actually sat and tried
21 to puzzle this through, and it seems like -- there
22 is -- this is an amazing situation. I've been involved
23 in commissions since the '70s, on CADA, regional -- was
24 chairman of the Regional Water Quality Control Board,
25 on and on; done this for almost my career. I've never,

15

1 ever come to a meeting and had two letters from two
2 counsel that said, oh, by the way, yes, you can meet
3 and, no, you can't meet. And by the way you're
4 criminally liable if you do, maybe, but we're not sure;
5 check your homeowner's policy. It's kind of amazing.

6 But I'm almost really kind of saddened by the
7 fact that all you guys have to sit hear and listen to
8 this. You know, we're paid \$100 for the privilege for
9 this kind of stuff. And you guys have to come and
10 listen to this. But here it is. I mean here we are.
11 We've got two conflicting advices to have a meeting or
12 do we not.

13 Okay. Let's go through the options, this is
14 that I've been trying to puzzle through. If we took
15 testimony today, as a subcommittee or as however you
16 want to call it, in order to not have a meeting, you
17 have to have less than a quorum. And if we count here
18 we have more than a quorum, so you can't do that
19 because we have more than a quorum.

20 Okay. Bifurcate the meeting, have a two-day
21 meeting, you can't do that because a two-day meeting is
22 a two-day meeting. You can't divide something that's
23 unified in half because if notice is defective for one,
24 it's defective for two.

25 Okay. So that leaves you either go ahead

1 against your counsel's advice or cancel the meeting.
2 That's pretty easy, A or B. And I don't think we're
3 going to go against our counsel's advice because the
4 chief law enforcement of the State of California just
5 informed us that we have some liability. And that
6 leaves an incredibly unpalpable option of canceling the
7 meeting.

8 So my thought is -- there's a December 3rd date,
9 which is as soon as we can do that after Thanksgiving,
10 and we should try to meet absolutely as soon as
11 possible. And just bite the bullet, accept the fact
12 that somebody screwed up and not to do any more finger
13 pointing and leave the responsibility where it lies,
14 and just get on with life.

15 So my proposal to everybody is that we adjourn
16 today, and notice the meeting for December 3rd, if
17 that's sufficient.

18 COMMISSIONER WALDHEIM: Mr. Chairman.

19 CHAIR SPITLER: Excuse me, was that a motion,
20 Commissioner Thomas?

21 COMMISSIONER THOMAS: Yes, with wanting for
22 everybody --

23 COMMISSIONER BRISSENDEN: I would second the
24 motion.

25 Is that a legal motion given that we're not

17

1 legally here?

2 COMMISSIONER WALDHEIM: Legally you can't even

3 make a motion anywhere.

4 COMMISSIONER THOMAS: Move to adjourn the

5 meeting that never occurred.

6 COMMISSIONER BRISSENDEN: Yeah.

7 COMMISSIONER WALDHEIM: Mr. Chairman.

8 CHAIR SPITLER: Mr. Waldheim.

9 COMMISSIONER WALDHEIM: That's my whole point.

10 There is no meeting here anyway, so we can discuss it.

11 These people can answer, we can work as a regular

12 meeting.

13 However, having said that, Ms. Greene, could you

14 tell us exactly when you put this thing on the website?

15 DEPUTY DIRECTOR GREENE: No problem at all,

16 Commissioner Waldheim. And thank you for the

17 opportunity to respond, because I think there have been

18 a few things that were said which actually have not

19 been necessarily true. My apologies for my voice this

20 morning. I have a cold here.

21 The meeting was noticed on the website on the

22 8th, Tuesday, the 8th. In fact, the notices were sent

23 out on the 9th. There was nothing sent out on the

24 10th.

25 CHAIR SPITLER: Director Greene, with all due

18

1 respect, I have a copy of a letter here that's a
2 notice, agenda, and packet for this meeting with a
3 postmark date on it of November 10th, which I'm happy
4 to share with you if you're interested.

5 DEPUTY DIRECTOR GREENE: If it was letters to
6 staff --

7 CHAIR SPITLER: No, it's not. It's a notice and
8 agenda and packet for this meeting, and the date is
9 November 10th.

10 DEPUTY DIRECTOR GREENE: I would welcome that,
11 Chairman Spitler. Again, we know that --

12 CHAIR SPITLER: So it's clear that not all of
13 the notices went out on the 9th.

14 DEPUTY DIRECTOR GREENE: I'm not going to get
15 into a back and forth right now. I don't think it's
16 appropriate, actually. I'd like to take a look at
17 that, but that being said --

18 CHAIR SPITLER: I'm happy to show it to you.

19 DEPUTY DIRECTOR GREENE: I believe it was 119
20 notices were sent out on the 9th to the public, many of
21 the hits as well to the website. As we have heard
22 today, I think that the people who lose here today
23 certainly are the public.

24 I would like the opportunity for our counsel to
25 be able to clarify some of where the Division comes

19

1 from and believes that we are actually in compliance,
2 and that we should move forward with this meeting
3 today.

4 COUNSEL TORGAN: If you'll bear with me,
5 correspondence was provided this morning to the
6 Commission. I'll read it into the record, so the
7 members of the public, who are here, at least know the
8 basis for the Division's belief that notice was in
9 compliance with Bagley-Keene.

10 "First off, I wish to apologize
11 for any confusion that may have been
12 created by the notice. That said,
13 however, the notice provided does
14 meet the full requirements of
15 Bagley-Keene Act.

16 "The overall purpose and
17 objective of the act is to conduct
18 the public business openly so the
19 public may be informed. The purpose
20 of the notice provisions in
21 particular are to provide the public
22 with sufficient information about
23 what actions may be taken at a
24 particular meeting with sufficient
25 advanced notification of when that

1 meeting will occur. This is so
2 members of the public have sufficient
3 time and information in which to make
4 a decision to attend or participate
5 in that meeting.

6 "To this end, Government Code
7 Section 11125(a) sets out the
8 requirements that notice of a meeting
9 be given at least ten days in advance
10 of the meeting, both by Internet and
11 writing.

12 "Section 11130.3(b)(3), however,
13 provides an explicit exception to the
14 rule in that an action taken at a
15 meeting covered by the fact, will not
16 be determined to be null and void if
17 that action was taken in substantial
18 compliance with the notice provisions
19 of Section 11125.

20 "The notice provided with
21 respect to this meeting, the meeting
22 at issue, clearly shows the
23 substantial compliance requirement
24 has been met. The meeting scheduled
25 for today and tomorrow has been

1 publicly discussed and known for the
2 past seven months.

3 "At a duly-noticed meeting of
4 April 15th, 2005, the Commission
5 established its calendar for the
6 upcoming year, including the
7 November 18 and 19 meeting dates, to
8 make final allocation for the fiscal
9 year 2005 grant program.

10 "On September 30 of this year,
11 the Commission Subcommittee on Grants
12 and Cooperative Agreements met in
13 Sacramento to establish a schedule of
14 Consent and business items to be
15 heard at that meeting. This
16 November meeting was explicitly
17 announced and referenced five times
18 during that subcommittee meeting.

19 "On October 21st of this year,
20 the subcommittee met in Riverside for
21 the same purpose. Again, this
22 November meeting was explicitly
23 announced and referenced this time on
24 eleven different occasions during
25 that subcommittee meeting. These

1 meetings were publicly noticed and
2 well attended.

3 "The specific notice and agenda
4 for today's and tomorrow's meeting
5 was posted on the Division's website
6 on November 8, ten days prior to the
7 meeting. A general announcement of
8 the date was actually posted earlier
9 than that date. A mailing to the
10 standard mailing list of interested
11 members of the public was sent on
12 November 9th, ten days prior to
13 November 19th, nine days prior to
14 today. As the lengthy history of
15 public meetings and announcements of
16 the November meeting shows, the
17 public has had extensive notice of
18 this meeting.

19 "Substantial compliance means
20 that despite technical nonconformity
21 with the Division, the overall
22 purpose of the statute has been met,
23 and the purpose of the statute has
24 not been frustrated by the defect."

25 There is case law noted in the letter which

1 addresses the issue of whether a time specific notice
2 provision that was missed was substantially complied
3 with.

4 "The facts in this situation
5 made clearly the objective and
6 purpose of the act have been well
7 met. Beginning early 2005, the
8 Commission meetings were for, among
9 other items, the purpose of gathering
10 public input and considering its
11 schedule for the 2005 grant
12 application approval process.

13 "The public was fully notified
14 and participated extensively in those
15 meetings. As late as September 3rd
16 and October 21, there was extensive
17 public involvement in the Commission
18 subcommittee meetings in preparation
19 for this meeting, subcommittee
20 meetings in which these meeting dates
21 were extensively referenced and
22 discussed. The public was notified
23 of the precise time by Internet
24 posting ten days prior to the
25 meeting, and by mail ten days prior

1 to the second day of the two-day
2 meeting.

3 "The Adobe Acrobat version of
4 the meeting notice has been
5 downloaded from the Division website
6 over a hundred times since it was
7 originally posted on the 8th. As you
8 can see by the people in the
9 audience, participants have already
10 arrived in Sacramento, are on their
11 way, or have made reservations to
12 arrive for tomorrow's session.

13 "There is clear, overwhelming
14 evidence that the public has been
15 afforded sufficient opportunity to
16 participate, despite the single day
17 mailing defect. The notice provided
18 meets the purpose and objective of
19 the act. They have not been
20 frustrated by the technical defect
21 that has been brought to our
22 attention. The Commission business
23 will be conducted openly, and the
24 public has and will be given a full
25 opportunity to participate.

1 "Pursuant to Government Code
2 Section 1125, the notice provision,
3 and 11130.3(b)(3), the substantial
4 requirement safe harbor provision,
5 sufficient notice has been given to
6 comply with the requirement of the
7 act.

8 "Respectively yours, Bradley
9 Torgan, General Counsel, Department
10 of Parks and Recreation."

11 I would also note, too, unlike most time
12 specific notice provisions, this act has a substantial
13 compliance safe harbor provisions, which virtually most
14 others do not.

15 COMMISSIONER THOMAS: Now, we've heard the
16 defense. And we appreciate both counsel's views and in
17 the words of my judge, I think we should take it out in
18 the mediation and get back to us within about a week.

19 Really, we're not in a position here to evaluate
20 these arguments. It's just not going to work.

21 CHAIR SPITLER: I would like to hear the
22 response from our counsel to that, to the Division's.

23 COMMISSIONER ANDERSON: I have one question
24 first, which maybe they can include, which is can
25 either of you cite any precedents with other

26

1 commissions on what's happened, anything similar?

2 COUNSEL JENKINS: My research has not revealed
3 any case on point about this issue with regard to
4 Bagley-Keene.

5 And with regard to the memo, I'll simply stick
6 to the legal analysis and suppose I would focus on the
7 second page, the paragraph where the case law is cited,
8 where Mr. Torgan describes what he believes substantial
9 compliance means, and tell you that I've never seen
10 these cases before, and I was not told about them
11 yesterday when we were discussing this with the
12 Division, and so therefore I don't know what these
13 cases say. I'll accept his representations.

14 I don't believe they involve Bagley-Keene, and
15 so the strength of those cases -- in my experience, I
16 would judge the strength of those cases, based on the
17 similarity between the statutes that are being
18 discussed and the similarity of the facts, and so I'm
19 just not in a position to tell you much more than that.

20 COUNSEL TORGAN: Mr. Jenkins is correct that
21 there is no case law I've been able to find dealing
22 specifically with the notice provision of Bagley-Keene.
23 What we have done, though, is laid out factually what
24 we believe allows you to come to a common sense
25 decision that indeed the notice provisions have been

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1 made.

2 CHAIR SPITLER: Counsel, could you just again
3 summarize your conclusion after hearing these
4 arguments?

5 COUNSEL JENKINS: I'll just refer back to my
6 letter, and I will say that I suppose our office is
7 giving you a relatively conservative interpretation of
8 the legal standards. And to the extent that these
9 represent differing positions that may be presented to
10 a judge, you can certainly feel confident that what's
11 contained in my letter is a relatively conservative
12 interpretation of this legal standard.

13 And in terms of substantial compliance, I
14 believe that our interpretation is that the substantial
15 compliance provisions are more reasonably applied to
16 the sections of Government Code Section 11125 that have
17 to do with describing the agenda, things that are less
18 than bright line. And that missing the bright line
19 ten-day rule doesn't amount to substantial compliance.
20 It amounts to noncompliance, and that drives our
21 interpretation.

22 CHAIR SPITLER: And that's in part because --
23 part of the reason for that is because there was
24 components of the agenda notice that were not provided
25 at the previous times suggested by Mr. Torgan?

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1 COUNSEL JENKINS: I would say that's my
2 understanding. And in addition, you know, the
3 legislature gave a bright line rule, so a bright line
4 is a bright line. Noncompliance isn't substantial
5 compliance under those circumstances.

6 COMMISSIONER WALDHEIM: Mr. Chairman.

7 CHAIR SPITLER: Commissioner Waldheim.

8 COMMISSIONER WALDHEIM: I've been at this since
9 1983, I've had lots of attorneys give us advice. I
10 will listen to their advice, but I can tell you I don't
11 necessarily follow their advice. So in this particular
12 case, I would like to know how many of you folks really
13 feel that this meeting should go on. Stand up if you
14 feel --

15 CHAIR SPITLER: Mr. Waldheim, that's really
16 inappropriate. That's really not the issue,
17 Commissioner Waldheim. I'm going to ask you to focus
18 on the issues that the Commission has to decide here.

19 COMMISSIONER WALDHEIM: This -- we have --

20 CHAIR SPITLER: We understand that any decision
21 that we make here is going to inconvenience many
22 people, and frankly it's unfortunate that we're even
23 being put in this position to have to make these
24 decisions.

25 COMMISSIONER WALDHEIM: Who is going to

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1 challenge us? Who is going to sue us for what we do
2 today?

3 CHAIR SPITLER: Commissioner Prizmich.

4 COMMISSIONER PRIZMICH: In listening to both
5 attorneys' commentaries, I appreciate them both. And I
6 do -- even though I live on the bright side of the
7 world and not the dark side, I do understand the value
8 of your points of view.

9 But with that being said, the reason I asked to
10 have that misdemeanor section read in the Government
11 Code was to determine if it were a specific or general
12 intent crime. And since it is a specific and intent
13 crime, I don't see where I personally would be involved
14 in the violation of a misdemeanor because I wasn't
15 involved in any of this process, this mailing process,
16 the notification process.

17 And it seems to me just logically there's a
18 number of people here that were noticed appropriately,
19 and that are here based on that notice, and are here to
20 give testimony or sway us one way or another. So the
21 concern I originally had with regard to violating the
22 misdemeanor for me personally is no longer there.

23 Although, if I'm faced with a challenge after
24 this that violates -- that alleges that I've violated a
25 misdemeanor, I do want counsel of my own.

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1 DEPUTY DIRECTOR GREENE: If I may just add to
2 Commissioner Prizmich, I just want to -- I will
3 apologize for that delay and again do believe that we
4 are in compliance with the law, but did want to go
5 ahead with this meeting because I truly believe that
6 the public, those people who are here today who care
7 about trying to allocate those monies and get it out on
8 the ground -- and I understand the position of the
9 Commission, but I would also say that in this
10 particular case, that the public is here, and that they
11 are passionate. And that too we recognized at the late
12 hour that all of this was coming up, that to try and
13 change airline flights and hotel accommodations of
14 which you wouldn't receive the monies back. And I
15 recognize again to the Commission that it is your
16 decision, but I also recognize that we do have a job
17 here to do, and hopefully we can do it today if at all
18 possible.

19 COMMISSIONER THOMAS: Let's move for a vote on
20 the motion to adjourn. I can make a defense. I can
21 make an argument. I'm not going to do that. Let's --
22 we're not supposed to have a meeting. That's our
23 advice. I made a motion to adjourn this meeting.
24 Let's deal with it.

25 CHAIR SPITLER: Okay.

1 COMMISSIONER WALDHEIM: Are we still under
2 discussion then, Mr. Chairman?

3 I appreciate you guys', the Commissioners'
4 feeling on this issue. I feel that the chances of us
5 personally being sued is miniscule. And if something
6 like that happens, as Mr. Prizmich, I will have my own
7 counsel, and I will depend on the Department of Parks
8 and Recreation to turn every stone around, if possible,
9 because they have to defend us because they're the ones
10 really in charge of putting these notices out. And if
11 they feel comfortable with it, I have no problem moving
12 forward with the meeting today.

13 So I will definitely vote no to adjourn. These
14 folks have come a long way, and they deserve to have
15 their time in front of us, and we should hear them.
16 Going home would be absolutely -- that would be
17 unconscionable for me.

18 COMMISSIONER BRISSENDEN: If I may, I do have
19 the same concern for those who have traveled far, we
20 all have.

21 But I didn't hear a P.S. on Counsel Torgan's
22 letter saying he would defend us. He will defend the
23 Division who misplayed the issue, and I don't think he
24 will defend us, and we have to refer to our counsel in
25 this matter.

1 COUNSEL TORGAN: I have been informed by the
2 Deputy Director, though, that whoever your counsel is,
3 in the minuscule remote chance it happens, DPR will
4 still be footing the bill.

5 DEPUTY DIRECTOR GREENE: So we end up paying
6 both attorneys.

7 COMMISSIONER PRIZMICH: That's why it's declared
8 a conflict.

9 COUNSEL TORGAN: However, normally we pay the
10 Attorney General to actually do the preparation.

11 COMMISSIONER WALDHEIM: Mr. Chairman, I would
12 like to point out that we, as a Commission, have the
13 right to hire an attorney, not necessarily the Attorney
14 General's Office. We do have that, that we can get it
15 across. Has it ever happened, no. We have tried it.
16 They have blocked us, but we do have the right to hire
17 independent counsel if we so desire.

18 So, Mr. Prizmich, your question about
19 independent counsel, Mr. Brissenden, independent
20 counsel, if we can do that, if something like that
21 comes up, if we don't like what we hear from Lockyer's
22 office, we can hire our own attorney, and the Division
23 will pay the bill.

24 CHAIR SPITLER: Unfortunate as it is, that this
25 meeting was not properly noticed by staff, Commission

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1 here is really in an untenable position. And I'm
2 certainly in no position to say that facing a
3 misdemeanor violation, I'm prepared to defend myself
4 from moving forward today.

5 So I think the most prudent course of action, as
6 unpleasant as it will be for us and everyone in this
7 room, to adjourn this meeting and reconvene at a time
8 when the meeting has been properly noticed.

9 There's no more discussion, we'll call for a
10 roll call vote.

11 MS. ELDER: Anderson.

12 COMMISSIONER ANDERSON: Aye.

13 MS. ELDER: Spitler.

14 CHAIR SPITLER: Aye.

15 MS. ELDER: Thomas.

16 COMMISSIONER THOMAS: Aye.

17 MS. ELDER: Prizmich.

18 COMMISSIONER PRIZMICH: No.

19 MS. ELDER: Waldheim.

20 COMMISSIONER WALDHEIM: No.

21 COMMISSIONER BRISSENDEN: Do I get to vote?

22 CHAIR SPITLER: Sandy, you missed one.

23 MS. ELDER: Oh, I'm sorry. Brissenden.

24 COMMISSIONER BRISSENDEN: Aye.

25 CHAIR SPITLER: The meeting is adjourned. Thank

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1 you.

2 (Meeting adjourned at 9:54 a.m.)

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1 REPORTER'S CERTIFICATE

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3 STATE OF CALIFORNIA) ss.
4 COUNTY OF SACRAMENTO)

5 I, CHERYL L. KYLE, a Certified Shorthand
6 Reporter in and for the State of California, duly
7 commissioned and a disinterested person, certify:

8 That the foregoing transcript was taken before
9 me at the time and place herein set forth;

10 That the statements of all parties made at the
11 time of the proceeding were recorded stenographically
12 by me to the best of my ability and were thereafter
13 transcribed into typewriting;

14 That the foregoing transcript is a record of the
15 statements of all parties made at the time of the
16 proceeding.

17 IN WITNESS WHEREOF, I subscribe my name on this
18 6th day of December, 2005.

19

20 Cheryl L. Kyle, CSR No. 7014
21 Certified Shorthand Reporter
22 In and for the
County of Sacramento,
State of California

23

24 Ref. No. 25706

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